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IN THE COURT OF APPEALS OF INDIANA

KELLI PLUMP,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0708-CR-431
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Heather Welch, Judge
Cause No. 49F09-0601-FD-8580

April 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Kelli Plump appeals her convictions for class D felony Medicaid fraud, class D felony theft, and class D felony identity deception. We affirm in part and vacate in part.

Issues

Plump raises two issues, which we restate as follows:

I. Did the trial court abuse its discretion by admitting her 2004 Hawthorn Heights lease application?

II. Do her convictions for Medicaid fraud and theft violate principles of double jeopardy?

Facts and Procedural History

Plump moved to Indianapolis in 2001, at which time she renewed her friendship with LaShanta Harvey, a woman she had known for several years when they both lived in Gary. Plump was struggling financially at this time, and Harvey assisted her in many ways, for example, by taking her out to eat, buying things for her children, and paying her credit card bills. Harvey told Plump that she ran several medical supply businesses. She offered to start a similar business with Plump, and Plump agreed.

On September 3, 2003, Plump signed a lease for rental space in downtown Anderson. She informed the landlord, Steve Narducci, that the space would be used for her medical supply company, Unlimited Medical Supplies ("UMS").[1] Also on September 3, 2003, articles of incorporation for UMS were filed with the Indiana Secretary of State. The articles

[1] At trial, Narducci testified that he observed "hardly any activity in [UMS's] unit at all." Tr. at 37. The only items in UMS's space were a desk, telephone, trash can, file cabinet, computer, and a "few odds and ends." *Id*. at 37-38. Eventually, Narducci terminated UMS's lease for nonpayment and took possession of the items in the rental unit.

identified Plump as the registered agent and incorporator of UMS, and the document bore Plump's signature.

On September 4, 2003, Plump filed, on behalf of UMS, a Medicaid billing provider enrollment application. The application identified Plump as president and owner of UMS. The application was processed by Electronic Data Systems ("EDS"), a company that administers the Indiana Medicaid program. EDS granted the application and enrolled UMS as a Medicaid billing provider. Through a separate application, UMS obtained access to submit claims electronically. On September 5, 2003, Plump went to a branch of National City Bank, identified her self as the president of UMS, and opened a checking account for UMS.

On March 26, 2004, EDS received an electronically-filed claim from UMS for Medicaid recipient Andrew Floyd. UMS claimed to have supplied Floyd with $9,575.55 in surgical wound care supplies and durable medical equipment. The claim provided a service date of December 28, 2003. On March 30, 2004, EDS issued to UMS a check in the amount of $9,575.55 for this claim. On March 31, 2004, the check was deposited into UMS's bank account at National City Bank. On April 1, 2004, a counter check payable to Plump was used to withdraw $8,500.00 from the UMS account. Plump's name was signed on both sides of the check, and her driver's license number and date of birth were written on the front of the check.

On November 9, 2004, Plump completed a lease application for an apartment at Hawthorn Heights Apartments in Anderson. On the lease application, Plump stated that she had been employed by UMS as a "medical biller" from August 2000 to November 2004 and

that she earned approximately $2,900.00 per month. *Id*. at 77. On November 10, 2004, the manager of Hawthorn Heights received copies of two UMS paystubs as proof of Plump's employment.[2]

In early 2006, Special Agent Steven Sidebottom of the Inspector General's Office for the U.S. Department of Health and Human Services contacted Andrew Floyd and his mother to learn whether Floyd had received the services that UMS had billed to Medicaid. Floyd had been hospitalized for approximately two weeks in December 2003. He was enrolled in Indiana's Medicaid program from September 1, 2003, to December 31, 2003. Floyd and his mother told investigators that Floyd had never received medical supplies or equipment from UMS. Neither Floyd nor his mother had authorized Plump, Harvey, or UMS to use Floyd's name, date of birth, social security number, or Medicaid identification number.

On February 28, 2006, Agent Sidebottom interviewed Plump. She admitted to him that she had signed the application for the UMS bank account and that she had withdrawn $8,500.00 at a National City Bank branch in Merrillville, Indiana, on April 1, 2004. Plump stated that Harvey had instructed her to do these things and that she had also followed Harvey's instruction to deliver the $8,500.00 to a person called "Deezie." Plump also told Agent Sidebottom that Harvey had told her to close the UMS account in April 2005 and to give the remaining balance to Harvey, which she did.[3] Initially, Plump denied knowing anything about the UMS office in Anderson. Later, she admitted that she had been to the office and had picked up mail there at Harvey's direction. Plump admitted that she and

[2] For purposes of this opinion, we will consider these pay stubs part of the lease application.
[3] Plump recounted these events similarly in her trial testimony.

Harvey had opened a medical supply business. She provided Agent Sidebottom with a paper bag full of records, including a document listing Andrew Floyd's address, social security and Medicaid identification numbers, and date of birth. The documents also included some of Floyd's medical records as well as a list detailing the items billed to Medicaid by UMS on behalf of Floyd. During Agent Sidebottom's investigation of UMS, he discovered no evidence that UMS had ever purchased medical supplies.

At trial, Plump testified that Harvey had assisted her in completing the lease application. She admitted that she had never worked as a medical biller for UMS. Plump also stated that she had been to the UMS office location only once and that she performed no day-to-day work for UMS. She claimed that her only involvement with UMS's checking account consisted of opening the account, withdrawing the $8,500.00 in April 2004, and closing the account and delivering the balance to Harvey in April 2005.

On January 25, 2006, the State charged Plump with Medicaid fraud, theft, and identity deception, all as class D felonies. Plump's first trial, on February 21, 2007, ended in a mistrial. On April 4, 2007, Plump's second trial was held, and the jury found her guilty as charged. The trial court sentenced Plump to three concurrent sentences of 545 days, with 539 days suspended to probation. Plump now appeals.

Discussion and Decision

I. Admission of Lease Application

Plump argues that the trial court erred by admitting her Hawthorn Heights lease application. Our standard of review of decisions regarding admissibility of evidence is well-settled.

> A trial court has broad discretion in ruling on the admissibility of evidence and we will reverse such a ruling only for an abuse of that discretion. An abuse of discretion generally occurs when a decision is clearly against the logic and effect of the facts and circumstances before the court. But to the extent a ruling is based on an error of law or is not supported by the evidence it is reversible, and the trial court has no discretion to reach the wrong result.

Morris v. State, 871 N.E.2d 1011, 1015-16 (Ind. Ct. App. 2007) (citations and quotation marks omitted), *trans. denied*.

With regard to the lease application, Plump filed a pre-trial motion in limine based on Indiana Evidence Rule 404(b). The trial court denied the motion. Plump objected when these documents were offered at trial, also on the basis of Rule 404(b), which states in pertinent part as follows:

> **Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In evaluating the admissibility of evidence under this rule, a trial court must: (1) decide if the evidence of other crimes, wrongs, or acts is relevant to a matter other than the defendant's propensity to commit the charged act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Evidence Rule 403, which states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

Plump claims that the lease application amounted to evidence of an act offered to prove that she had a dishonest character because, as Plump admitted at trial, she fabricated the information on that application regarding her UMS employment history. The State

argued that it offered the lease application as evidence that Plump worked as a medical biller for UMS at the time UMS submitted Floyd's claim:

> We filed our Notice of Intent to Offer [404(b)] Evidence that on a lease application, Ms. Plump listed her employment with Unlimited Medical Supply. And she listed herself as the biller for that corporation. She also submitted pay stubs that were from Unlimited Medical Supply. She showed that as proof for her application for lease. The State's case on Medicaid Fraud is that [she] and her accomplice submitted false claims. Generally, the biller would be the person who would submit any claim. During the questioning and on the stand on this trial in the previous matter, she indicated that she really didn't do any substantive work for Unlimited Medical Supply. Never was employed there in reality and that she never received any salary from working there. So, this is probative both to the underlying issue of the fraud and what she did and what she didn't do for the company. As well as somewhat impeachment. … [I]t's not really even 404(b) in the first place because it's not a bad act. Her being employed as a medical biller is – is in no concept a bad act. And in terms of you [sic] were to consider it a bad act, it would be a[n] issue on knowledge, lack of mistake.

Appellant's Supp. App. at 22-23 (Tr. of Pre-Trial Conference).

Regardless of the prosecutor's argument, the trial court did not abuse its discretion by admitting the lease application. Pursuant to Rule 404(b), the application is relevant to a matter other than Plump's propensity to commit the criminal acts with which she was charged. We agree with the State that to the extent that Plump claims that she was unaware of any wrongdoing by UMS and/or Harvey, the lease application is evidence of Plump's knowledge that UMS was not the corporation it appeared to be and that there was no mistake in her use of UMS for her personal benefit. We cannot say that the probative value of this

evidence is substantially outweighed by the danger of unfair prejudice. We find therefore that the trial court did not abuse its discretion in admitting the lease application.[4]

II. Double Jeopardy

Plump also alleges that her convictions for Medicaid fraud and theft violated Indiana's double jeopardy clause. Pursuant to Article 1, Section 14 of the Indiana Constitution, "No person shall be put in jeopardy twice for the same offense." In order to determine whether Plump's constitutional rights were violated, we must apply the test set out by our supreme court: "[T]wo or more offenses are the 'same offense' in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to *either* the statutory elements of the challenged crimes *or* the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999) (emphasis in original). Plump specifically argues that her convictions violate the actual evidence test. Therefore, she must demonstrate a reasonable possibility that the evidentiary facts used by the jury to establish the essential elements of Medicaid fraud may also have been used to establish the essential elements of theft. *Id*. at 53. In making this determination, we may consider the charging information, arguments of counsel, and final jury instructions. *McIntire v. State*, 717 N.E.2d 96, 100 (Ind. 1999).

[4] We note that when extrinsic act evidence is admitted for a permissible purpose, the trial court should instruct the jury as to the limited purpose for which the evidence may be considered, e.g., evidence to show knowledge or absence of mistake. *See Hare v. State*, 467 N.E.2d 7, 18-19 (Ind. 1984) (where State presented evidence of other crimes committed by defendant, trial court properly instructed jury that the evidence was admissible only to show intent, motive, identification or a common scheme or plan, and not as proof that defendant committed the robbery for which he was on trial). Here, Plump failed to request such an

The charging information for the Medicaid fraud and theft counts reads as follows:

> Count I [Medicaid Fraud]
> Kelli Plump, on or between March 30, 2004 and April 1, 2004, *did obtain payment*, that is: a check for $9575.55, from the Medicaid program under IC 12-15 by means of a false or misleading oral or written statement or other fraudulent means, that is: by electronically submitting a claim stating that Unlimited Medical Supplies, Inc., a company for which she is the President, supplied durable medical equipment to Andrew Floyd;
>
> Count II [Theft]
> Kelli Plump, on or between March 30, 2004 and April 1, 2004, *did knowingly exert unauthorized control over* the property, that is: United States currency, of Indiana Health Coverage Program, also known as Medicaid, with intent to deprive Indiana Health Coverage Program, also known as Medicaid of any part of the value or use of said property.

Appellant's App. at 23-24 (emphases added).

In its appellate brief, the State claims that its case included evidence to prove the Medicaid fraud charge under an accomplice liability theory, specifically that Plump had assisted in establishing UMS and had in her possession at the time of her arrest the information needed to submit the fraudulent claim. As for the theft charge, the State cites Plump's withdrawal of $8,500.00 on April 1, 2004. Our review of the record reveals that the State's arguments were much less clear at trial.

During the State's closing argument, the prosecutor described the Medicaid fraud charge as follows:

> Now, the Medicaid Fraud charge that we put out there, there's three of them out there actually. [There's] submitting a false claim. There's receiving funds from a false claim. And enrolling fraudulently. Those are the three types of Medicaid Fraud that are coming under the statute. *We've only charged one of*

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instruction. A defendant who does not request a limiting instruction waives the issue on appeal. *Humphrey v. State*, 680 N.E.2d 836 (Ind. 1997).

> *those three. Which is receiving the money.*[5] Okay? Because like we said in our opening statement – I don't know who submitted that claim. It's not important. It's not one of our elements. I'd like to know that. Just like I'd like to know what her motivation is in committing this crime. But that's not one of the offenses—that's not one of the elements of the offense. *The elements of the offense are did she receive the property that was the subject of a false claim. She walked away with money. She receive[d] that property. That's the Medicaid Fraud Count.*

Tr. at 230-31 (emphases added).

Later in his argument about the Medicaid fraud charge, the prosecutor references an element of the theft charge: "So she wants to play Ms. Innocent, like she didn't know what was going on and once she found out, she put a whole stop to all of this. *But she [was] still exerting unauthorized control; she [was] still exerting control over that bank account. It was*

[5] We note the conflict between the elements included in the written jury instruction on Medicaid fraud versus those described by the prosecutor at closing. The written instruction includes the element of "submitting a claim" but the prosecutor stressed to the jury during his closing argument that submission of a claim is not one of the elements of the offense. Apparently, the State inadvertently combined the definitions of two different types of Medicaid fraud in its charging information. The Medicaid fraud statute reads in relevant part:

> (a) Except as provided in subsection (b), a person who knowingly or intentionally:
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> (1) *files a Medicaid claim, including an electronic claim, in violation of IC 12-15*;
> (2) *obtains payment from the Medicaid program under IC 12-15 by means of a false or misleading oral or written statement or other fraudulent means*;
> *(3)* acquires a provider number under the Medicaid program except as authorized by law;
> *(4)* alters with the intent to defraud or falsifies documents or records of a provider … that are required to be kept under the Medicaid program; *or*
> (5) conceals information for the purpose of applying for or receiving unauthorized payments from the Medicaid program;
>
> commits Medicaid fraud, a Class D felony.

Ind. Code § 35-43-5-7.1 (emphases added). As evidenced by the word "or" included after the fourth type of Medicaid fraud, the State needed only to charge that Plump had committed one of these five actions. In essence, the State increased its own burden by combining two sections of the statute in the charging information and then apparently attempted to correct this error through its closing argument.

her bank account." Tr. at 233 (emphasis added). In the State's rebuttal argument, it also noted that the UMS bank account was "under the control of Kelli Plump." Tr. at 248.

As for the theft claim, the prosecutor stated: "You don't need to look at circumstantial evidence. She walked out of the bank with the money. Count[] Two [is] simple." Tr. at 234.

The State now claims to have proven the Medicaid fraud charge using "evidence showing Plump had assisted in establishing the fraudulent business and had the information needed to submit the fraudulent claim in her possession at the time of her arrest." Appellee's Br. at 10. At trial, however, the prosecutor linked these pieces of evidence to the third count against Plump, which was identity deception.[6] Tr. at 234 ("The information needed to submit those false claims is identifying information and the actual codes for the bandages, that were charged, all those were in the burgundy folder and all those were in her possession. That's all [the identity deception count] is. Possession of the identifying information of Andrew Floyd. That's all you need to convict her of [identity deception].")

In sum, the State's explanation of the three separate charges against Plump and the evidentiary facts offered to prove the elements of each of these charges is confusing at best, misleading at worst. In our view, there is a reasonable possibility that the evidence that

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[6] The trial court's jury instruction on identity deception stated in part as follows:

> Before you may convict [Plump], the State must have proved each of the following beyond a reasonable doubt:
> That [Plump] on or about March 26, 2004
> 1. did with intent to harm or defraud … Medicaid,
> 2. knowingly obtain, possess, transfer or use identifying information … of Andrew Floyd;
> 3. without his consent.

Appellant's App. at 113-14.

Plump assisted Harvey in establishing the UMS account and then withdrew $8,500.00 from the account on April 1, 2004, may have been used by the jury to establish the elements of Medicaid fraud—obtaining payment from Medicaid through a fraudulent means—and to establish the elements of theft—exerting unauthorized control over Medicaid funds with the intent to deprive Medicaid of any part of the value or use of those funds.

For these reasons, we conclude that double jeopardy principles were violated, and therefore, we vacate Plump's Medicaid fraud conviction.

Affirmed in part and vacated in part.

BAILEY, J., and NAJAM, J., concur.